IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 242 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SARALADEVI SARABHAI (P - 1)D - TRUST

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

SERVED BY RPAD - (N) for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 09/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this Reference, at the instance of the assessee, following question is referred for our opinion with reference to Assessment Year 1974-75 :-

"Whether,on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the contribution in the partnership firm amounted to transfer within the meaning of section 2(47) of the Income-tax Act, 1961 resulting into capital gains chargeable to tax ?"

2. At the hearing of the Reference, Mr. R.K.Patel, learned counsel for the assessee and Mr. Kureshi, learned counsel for the Revenue state that the controversy raised herein is squarely covered by the decision in SUNIL SIDDHARTHBHAI v. COMMISSIONER OF INCOME-TAX, AHMEDABAD, (1985) 156 I.T.R. 509.

3. In the aforesaid decision, the Apex Court has held that where a partner in a firm makes over his personal assets as his contribution to its capital, though there is a transfer of such assets, but the cosideration which a partner receives on making over his personal assets to the firm as its contribution, cannot fall within the terms of section 48 of the Income Tax Act, 1961 and as that provision is fundamental to the computation machinery incorporated in the scheme relating to the determination of the charge provided in section 45, such a case must be regarded as falling outside the scope of capital gains taxation altogether.

4. Mr. Kureshi,learned counsel for the Revenue, however, invited our attention to the caveat sounded by the Apex Court in the penultimate paragraph of the aforesaid decision and submitted that liberty may be reserved to the Assessing Officer to consider whether the partnership firm or the transaction in question was genuine or sham and also to consider other issues referred to in the aforesaid caveat.

5. Mr. Patel,learned counsel for the assessee on the other hand submitted that such a request was considered, but rejected by this Court in COMMISSIONER OF INCOME-TAX v. HARIKISHAN JETHALAL PATEL, (1987) 168 I.T.R. 472.

6. In the case of HARIKISHAN JETHALAL PATEL (supra), this Court has already observed that in cases where foundational facts do not exist raising even a remote

doubt regarding the genuineness of the firm and/or the transaction in question, a second innings should not be permitted to the Revenue, as it would result in avoidable hardship and harassment to hundreds of assessees whose cases stand covered by the aforesaid decision of the Supreme Court. We are of the opinion that there are no foundational facts on the record of this Reference raising doubt regarding genuineness of the partnership firm and/or the transaction in question and, therefore, a second innings should not be permitted to the Revenue for reconsidering the entire matter, more particularly when the Reference is with reference to Assessment Year 1974-75. Permitting the Revenue to have the second innings in the facts of the case would result into avoidable hardship and harassment to the present assessee.

7. In view of the aforesaid discussion, we are not inclined to grant any liberty to the Revenue to make any de-novo inquiry about the genuineness of the partnership firm or the transaction in question.

8. In the result, the question referred to us is answered as under :

Though handing over of personal assets by the partner to the firm as his contribution to its capital did amount to transfer, the transaction did not attract any liability to capital gains under section 45 of the Act.

9. The Reference stands disposed of accordingly, with no order as to costs.

(J.M.Panchal,J.)

(M.S.Shah, J.)

(patel)